

REMARKS

Claims 2, 3, 5, 6, 8, 9, 11, 14, 16-22, 26, 27, 29, 31, 32, 34, 35, 37, 38, 40, 44, 45, 47, 48, 50, 52 and 53 are pending in the present application. Claims 2, 3, 26, 27, 31, 32, 37, 44, 45 and 50 have been amended, and Claims 7, 10, 28, 36, 39, 49 and 52 have been cancelled, herewith. Reconsideration of the claims is respectfully requested.

I. 35 U.S.C. § 103, Obviousness

The Examiner rejected Claims 2, 7-10, 26, 28, 31, 36-39, 44 and 49-52 under 35 U.S.C. § 103 as being unpatentable over Ahmed et al, U.S. pat. No. 6,629,148. This rejection is respectfully traversed.

Claim 2 has been amended to include the features previously recited in Claim 7 (and Claim 7 is thus being cancelled herewith, without prejudice or disclaimer). Claim 2 in combination with Claim 7 recited a feature of "performing path balancing if a difference in a total path usage of a path having a highest path usage and a total path usage of a path having a lowest path usage is greater than a threshold usage amount, wherein the total usage for each path is determined as a function of the total usage for each second device associated with each path". In rejecting Claim 7 (whose features are now a part of amended Claim 2), the Examiner states that Ahmed teaches that the path usage is calculated based upon number of connections, response time, etc., citing Ahmed col. 5, lines 21-43. Applicants urge that this passage describes using internal component characteristics (the layers that are being monitored are described as being objects such as a web server, application server, database; col. 4, lines 7-33) in order to determine the health of an object, and then using health of the objects to determine health of a path (col. 5, line 66 – col. 6, line 8; col. 6, lines 62-66). This allows for a determination to be made as to the ability of a given object/layer to process additional information from a network (col. 5, lines 44-52). It is not concerned with actual traffic on the paths between the objects, but to the processing capability of the objects themselves. Claim 2 has been amended to further clarify this distinction between actual usage/traffic of the paths versus processing capabilities of the objects/nodes themselves. Claim 2 advantageously provides an ability of balancing paths *based on usage of the paths by devices*, which is

substantially different from balancing paths *based on operational capabilities of objects attached to a path*, as described by Ahmed. It is thus urged that amended Claim 2 is not obvious in view of the cited reference, as every claimed element is not taught or suggested by the cited reference¹.

Applicants traverse the rejection of Claims 8 and 9 for similar reasons to those given above with respect to Claim 2 (of which Claims 8 and 9 depend upon).

With respect to Claim 10, such claim has been cancelled herewith without prejudice or disclaimer.

With respect to Claim 26, such claim has been amended to include the features previously recited in Claim 28 (with Claim 28 thus being cancelled herewith, without prejudice or disclaimer). As amended, Claim 26 recites a feature of "wherein the first means accumulates a total path usage for each of the plurality of paths by sampling a number of input/output messages issued over each of the paths during a sampling period". The cited reference does not teach or suggest this claimed feature – but rather describes determining operational status of a given component - and thus a prima facie case of obviousness has not been established (as every element of the claimed invention is not taught or suggested by the cited reference). Accordingly, such claim is shown to have been erroneously rejected².

With respect to Claim 28, such claim has been cancelled herewith without prejudice or disclaimer.

With respect to Claim 31 (and dependent Claims 37 and 38), Applicants traverse for similar reasons to those given above with respect to Claim 2.

With respect to Claims 36 and 39, such claim has been cancelled herewith without prejudice or disclaimer.

With respect to Claim 44, 50 and 51, Applicants traverse for similar reasons to those given above with respect to Claim 26.

¹ To establish prima facie obviousness of a claimed invention, all of the claim limitations must be taught or suggested by the prior art. MPEP 2143.03. See also, *In re Royka*, 490 F.2d 580 (C.C.P.A. 1974).

² If the examiner fails to establish a prima facie case, the rejection is improper and will be overturned. *In re Fine*, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988).

With respect to Claims 49 and 52, such claim has been cancelled herewith without prejudice or disclaimer.

Therefore, the rejection of Claims 2, 7-10, 26, 28, 31, 36-39, 44 and 49-52 under 35 U.S.C. § 103 has been overcome.

II. Objection to Claims

The Examiner stated that Claims 3, 5, 6, 11, 27, 29, 32, 34, 35, 40, 45, 47, 48 and 53 were objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. In response, Claims 3, 27, 32 and 45 have been rewritten in independent form including all of the limitations of the base claim and any intervening claims. The remaining objected to Claims 5, 6, 11, 29, 34, 35, 40, 47, 48 and 53 depend upon these amended claims, and thus these Claims 5, 6, 11, 29, 34, 35, 40, 47, 48 and 53 are now allowable in their present form.

Therefore, the objection to Claims 3, 5, 6, 11, 27, 29, 32, 34, 35, 40, 45, 47, 48 and 53 has been overcome.

III. Allowable Claims

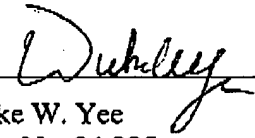
Applicants graciously acknowledge the allowance of Claims 14 and 16-22.

IV. Conclusion

It is respectfully urged that the subject application is patentable over the cited reference and is now in condition for allowance. The Examiner is invited to call the undersigned at the below-listed telephone number if in the opinion of the Examiner such a telephone conference would expedite or aid the prosecution and examination of this application.

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Respectfully submitted,


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